**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**SHERMAN DIVISION**

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| **BLAKE DWYER,** | § | |
| **Plaintiff** | § | |
| | § | |
| **v.** | § | **CASE NO. 4:09-CV-198** |
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| **KEVIN TYSON, A POLICE** | § | |
| **OFFICER FOR THE CITY OF** | § | |
| **CORINTH, TEXAS,** | § | |
| **Defendant** | § | |

**PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL**

***Duty of Court to Grant a New Trial***

In a civil case the trial court has extremely broad discretion to grant a new trial. Federal Rule of Civil Procedure 59 is predicated on the common-law principle that it is the duty of the trial judge who is not satisfied with a jury verdict to set it aside and grant a new trial.[1]

> To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require.[2]

If the trial judge deems a new trial in the interest of justice, he has not only the right, but also the duty to do so.[3]

***Grounds for New Trial—In General***

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[1] WRIGHT, MILLER AND KANE, 11 Fed. Prac. & Proc. 2d, Sec. 2801 (hereafter WRIGHT, at Sec.____).

[2] Aetna Casualty & Surety Company v. Yeatts, 122 F2d 350, 354 (4th Cir. 1943) per John J. Parker, J.

[3] WRIGHT, Sec. 2803, and cases cited at n. 1; North Texas Producers Association v. Metzger, 348 F2d 189 (5th Cir. 1965).

The drafters of Rule 59 found it impracticable to enumerate all grounds for new trial, so the rule is stated as broadly as possible.[4] The general grounds are that the verdict is against the weight of the evidence, that the damages are excessive or insufficient, that for other reasons the trial was not fair, and that there were substantial errors in the admission or exclusion of evidence or in the giving or refusal of instructions.[5] It is important to note, however, that the failure of the movant to list specific grounds should not obscure the governing principle: The court has a *duty* to order a new trial whenever, in its judgment, this is required to prevent injustice.[6]

***Misconduct of Counsel***

One ground that has been sustained a basis for granting a new trial is that the conduct of counsel tainted the verdict.[7] If a verdict has been unfairly influenced by conduct of counsel a new trial should be granted.[8] In the present case counsel for Defendant repeatedly asked leading and suggestive questions to key witnesses for Defendant. These questions often assumed facts not in evidence, and were deliberately calculated to place Plaintiff's counsel in the position of having to rise and object or to let the question go, thus permitting counsel for Defendant to become the main witness for his client. The court repeatedly sustained Plaintiff's objections to leading and suggestive questions, and repeatedly admonished Defendant's counsel not to lead. At times the trial judge, on his own and in the absence of an objection, told Defendant's lawyer not to lead his witness. The sustaining of the objections and admonitions did little good to remedy the problem, because once the leading question had been asked, counsel could them follow it with a proper question to which the witness had already been given the answer. At one point the court, on his own motion, excused the jury and took counsel into the court conference room. In this setting the court pointedly asked Defendant's lawyer if he understood what a leading question is. The court then explained the rule to counsel and again admonished him not to lead. In 41 years of practicing law and many jury trials counsel for Plaintiff has never before seen a trial judge go to such lengths.

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[4] Wright, Sec. 2805.

[5] Wright, Sec. 2805 and cases cited at n. 5; Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940).

[6] Wright, supra; Wilheim v. Blue Bell, Inc., 773 F2d 1429, 1433 (4th Cir. 1985); Conway v. Chemical Leaman Tank Lines, Inc, 87 FRD 712, 715 (D.C. Tex. 1980).

[7] Wright. Sec. 2809.

[8] Fineman v. Armstrong World Industries, Inc., 980 F2d 171 (3rd Cir. 1992).

***Trial on False Evidence not subject to Cross Examination***

The number of leading questions asked by Defendant's counsel diminished somewhat after this last admonition, but despite the efforts of the trial judge and plaintiff's lawyer, it was too late to cure the harm that the repeated leading questions had caused. When, through leading questions on critical fact issues a lawyer becomes the principal witness for his client, the unfairness to the other side is not a minor thing. The opposing lawyer has to be on his feet constantly, implying to a jury of laymen that he is trying to keep something from them. The lawyer asking the leading questions can then follow up with a proper question, and the witness now knows how to answer. Thus the jury has been fed an answer by a witness (the lawyer) who is not subject to cross examination. The lawyer providing the answer is not subject to cross examination and cannot be called out on the inaccuracies, untruths or misleading character of his "testimony." Further, the lawyer through the leading questions has been able to inject details into his witness testimony that may not be part of the actual information the witness knows. Finally, and perhaps more important, the truth finding process has been compromised because the jury has been deprived of the answer the witness would have given if he had been asked a proper question in the first instance, and the lawyer who must then cross-examine the witness must deal with the contrived answers elicited through leading.

This is the civil law equivalent of an officer using a defective photo array or making improper suggestions to an identity witness in a criminal case to elicit identification of a particular suspect. Once the witness has been mislead into identifying the person who the officer is targeting, his position that the particular person is "the man I saw" becomes hardened and extremely difficult for even the cleverest cross examiner to shake. DNA evidence has freed scores of incarcerated persons who were "positively identified" by witnesses who swore that "I am positive and could never forget the face of the man who (insert crime committed). While this analogy between criminal identification testimony and testimony elicited by leading questions in a civil case will undoubtedly be ridiculed by Defendant, Plaintiff submits that it is exactly the same principle. A witness to an event wants to testify and help the lawyer who is calling him, or the officer who is questioning him. In each instance the witness is led to state positively facts which are being supplied to him by the questioner. Once the questioner has supplied the facts the witness becomes sure that they are correct and digs his heels in to any other possibility than what he said in response to leading questions. The rule against leading one's witness may seem to some to be not really that important, and a barrier to getting at the witness's information about an event. On closer examination it is an indispensible part of our adversary system, and the result of ignoring this little rule may well lead to false verdicts in civil cases, just as tainted eye witness testimony had lead to false convictions.

All trials have leading questions, and some are harmless. When, however, as in this case the serial leading questioner is permitted to substitute his testimony for that which the witness likely would have given if asked proper questions, an unfair trial and an erroneous verdict are the likely outcome. That occurred in this case, and on that basis alone the court should grant a new trial.

Counsel for Defendant also repeatedly misstated in his questioning and argument the testimony which had been presented. Counsel also repeatedly tried to inject into the proceedings the outcome of other cases. Although most of the objections to these attempts were sustained, the cumulative effect of these attempts coupled with the leading questions caused an unfair trial to occur. This court knows better than anyone what happened, and it is within this court's power to grant a new trial in the interest of justice. In reading the Wright Treatise and head notes of the cases cited it seems clear that the actual standard is the trial court's sense of whether the trial was unfair. If the trial judge so concludes he should do his duty and grant a new trial.

***Weight of the Evidence***

If the trial judge finds that the verdict was against the weight of the evidence he should grant a new trial.[9] A party may move for a new trial on a weight of the evidence ground even if the party has not moved for a judgment NOV.[10] Therefore, on a motion for new trial as opposed to a motion for judgment as a matter of law, the judge may set aside the verdict even though there is substantial evidence to support it.[11] In so doing, the judge is not bound by the credibility determinations of the jury.[12] One court stated:

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[9] Wright, Sec. 2806; Bird v. Blue Ridge Elec. Co-op, 356 U.S. 525 (1958).

[10] National Car Rental System v. Better Monkey Grip Co., 511 F2d 724, 725 (5th Cir. 1975).

[11] Wright, supra; Lama v. Borras, 16 F3d 473, 477 (1st Cir. 1994).

[12] Poynter v. Poynter v. Ratcliff, 874 F2d 219 (4th Cir. 1989) (in considering MNT judge may weigh evidence and consider credibility of witnesses, and if he finds verdict against weight of evidence, is based on false evidence, or will result in miscarriage of justice he must set aside verdict and grant new trial); accord, Isley v. Motown Record Corp., 69 FRD 12 (D.C.N.Y. 1975); ATD Corp. v Lydall, Inc., 159 F3d 534, 539 (C.A. Fed. 1998).

> [I]n ruling on a motion for new trial, the court may assess the weight of the evidence, without viewing it in the best light for the party favored by the verdict, and this determine whether the verdict, even if sustained by some evidence, is nonetheless seriously erroneous or is manifestly a miscarriage of justice.[13]

In the present case the following facts are undisputed, not seriously questioned by competent testimony, or supported by a preponderance of the credible evidence:

1. Blake Dwyer was 16 years old, approximately 6 feet tall and weighed approximately 170 pounds;
2. Blake was an epileptic who suffered from grand mal seizures.
3. Blake and his friends spent the previous night at a friend's house, and some of the boys, including Blake smoked marijuana.
4. According to the testimony of the other boys the marijuana was plain marijuana and was not spiked or tainted with any other drug.
5. Blake suffered a grand mal seizure.
6. After the paramedics arrived Blake was in what is called a post-ictal state of the seizure.
7. Some post-ictal patients become combative in the post-ictal state.
8. The paramedics, particular paramedic Morris testified that Blake was "alert and oriented times 0" when the paramedics arrived, meaning that he was not oriented to time, place, person or event, and was unable to understand and respond to simple commands.
9. Morris testified that Blake became more disoriented as matters progressed than he was when they arrived.
10. Blake became combative when the paramedics tried to put him on a gurney and strap him to it.
11. Blake unintentionally hit Paramedic Sheppard in the face, knocking his hat off. No paramedic or police officer was injured.
12. When Sgt. Tyson and the other officers arrived, the only means they tried to employ to control Blake was to repeatedly use the Taser on him in the Drive Stun mode. They never tried to use soft restraints, handcuffs, cable ties, flex cuffs, or other means to secure his arms.
13. Although the witnesses had inconsistencies in their recollections, the preponderance of the evidence is that the paramedics were able to secure the straps around Blake's legs and mid-section, but not his chest and arms.
14. When Blake was Tased he was being held to the gurney by at least 5 large, strong men.
15. Sgt. Tyson began the use of the Taser as his first option after telling Blake that if he did not stop struggling he would be Tased.
16. At that time Blake had no ability to understand these commands or comply with them.

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[13] Otero v. Housing Authority of City of Bridgeport, 263 F.Supp.2d 440 (D.C. Conn. 2003).

17. Travis Baker initially was able to calm Blake down by talking gently to him in a soothing tone.
18. Travis told the paramedics and police officers that they were hurting Blake, that he was claustrophobic, and that they should not confine him. Blake's attempts to get the paramedics and officers to act differently was either ignored or not heard. Other witnesses made similar statements to the paramedics and officers and were similarly ignored or not.
19. Sgt Tyson began using the Taser on Blake within a couple of minutes after entering the house. Sgt. Tyson made no attempt to inform himself of the type of medical emergency that was confronting the paramedics.
20. Sgt. Tyson fired the Taser 15 times and Tased Blake both in the house and in the ambulance.
21. Sgt. Tyson had no reasonable basis to believe that Blake was a danger to either the officers or the paramedics.
22. Sgt. Tyson gave only fleeting consideration to any action but the Taser.
23. The only purpose of using the Taser in the drive stun mode is to inflict pain on the subject in an effort to make the subject comply with the commands the officer is giving.
24. According to Sgt Tyson's own testimony Blake had at least 11 sets of burn marks (22 marks) from Sgt. Tyson's application of the weapon to Blake's Body.
25. Sgt. Tyson filed a false or deliberately misleading use of force report form indicating that the Taser was used twice, once in the house and once again in the ambulance.
26. Officer Brock's uncontradicted testimony was that when he was drive stunned it was the most painful experience of his life.
27. Sgt. Tyson violated his department's own policies and procedures by deploying the Taser under the circumstances confronting him since Corinth permits its use only with the same care that one would take in using a firearm, and only when necessary in effecting an arrest in a criminal case. Tyson admitted that he was not there to arrest Blake, and the paraphernalia charge is a class C misdemeanor for which a citation would be issued and no arrest would ordinarily be made.

***Conclusion and Prayer***

Under these circumstances it is difficult to see how a reasonable jury could conclude that the Officer did not use excessive force, as they did in their answer to the first jury question. Because the other jury questions were conditioned on an affirmative answer to the first, we do not know what the jury would have concluded about the other issues. The misconduct of counsel coupled with an almost inexplicable jury answer that a police officer does not use excessive force in Tasing a 16 year old boy while he is being held down by at least 5 strong men cries out that this trial was unfair and the verdict unjust, despite the efforts of the trial judge to see justice done. For these reasons Plaintiff prays that this court set aside the jury verdict and grant a new trial

Respectfully submitted,

MICHAEL J. WHITTEN & ASSOCIATES, P.C.
218 North Elm Street
Denton, TX 76201
Tel.: (940) 383-1618
Fax: (940) 898-0196

MICHAEL J. WHITTEN
SBN: 21392000

HAIRE LAW FIRM
1120 North Locust Street
Denton, TX 76201
Tel.: (940) 484-5555
Fax: (940) 380-4078

/S/
RODNEY WILLIAM "ROCKY" HAIRE
SBN: 00795402
JUSTIN J. STEINBOCK
SBN: 24051383

Attorneys for Plaintiff BLAKE DWYER

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was forwarded to all Counsel of record as indicated below on the 12th day of November 2010, in accordance with the Texas Rules of Civil Procedure.

**Sent Via Facsimile (214) 253-2626 and email**
Mr. Casey S. Erick, Esquire
Mr. William W. Krueger, III, Esquire

MCKAMIE KRUEGER, L.P.
2007 North Collins Boulevard, Suite 501
Richardson, Texas 75080
Attorneys for Defendant KEVIN TYSON